

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

EMBLEM ASSOCIATES, LLC,)	
)	
Complainant,)	
)	DOCKET NO. 16-0008
v.)	
)	
ARTESIAN WATER COMPANY, INC.)	
)	
Respondent.)	

STAFF’S POST-HEARING BRIEF TO THE HEARING EXAMINER

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NATURE AND STAGE OF THE PROCEEDINGS

On January 6, 2016, Emblem Associates, LLC (“Emblem”) filed a Verified Complaint with the Delaware Public Service Commission (the “Commission”) alleging that Artesian Water Company, Inc. (“Artesian”) had improperly demanded and calculated a Contribution In-Aid-of Construction (“CIAC”) to provide water service to Emblem’s proposed development of apartment residences near the Christiana Mall in New Castle County, Delaware.

On January 28, 2016, Emblem and Artesian agreed to a Stipulation and Proposed Consent Order that resolved Emblem’s Motion for Expedited Relief, whereby Artesian would provide service to Emblem pursuant to a Water Services Agreement after receiving a payment of \$459,000, the amount of the CIAC under dispute, which Artesian would refund to Emblem in whole or in part if necessary upon the resolution of this complaint docket. The Commission voted to approve this, thus mooted Emblem’s Motion for Expedited Relief, at its February 4, 2016 meeting.

On January 28, 2016, Artesian filed an Answer disputing Emblem’s allegations and asserting that the CIAC was properly demanded and calculated.

On January 29, 2016, Senior Hearing Examiner Mark Lawrence (the “Hearing Examiner”) was assigned to conduct an evidentiary hearing and file his report, findings, and recommended decision with the Commission.

The parties conducted discovery, and pre-filed direct testimony was filed by Emblem (Ted C. Williams¹ and Kevin P. Kelly²) and Staff (Connie McDowell³).

Prior to the evidentiary hearing, the Hearing Examiner *sua sponte* requested briefing from the parties regarding whether the complainant Emblem or the respondent Artesian had the burden

¹ Hearing Exhibit (“Ex.”) 112.

² Ex. 111.

³ Ex. 113.

of proof in this proceeding. Artesian and Staff filed briefs asserting that Emblem, as the moving party, had the burden of proof in a dispute that was not an application to increase rates. Emblem filed a brief opposing this position. In Order No. 8893, the Hearing Examiner determined that determining a CIAC was “ratemaking,” and as such, the burden of proof shifted to Artesian. Neither Artesian nor Staff filed an interlocutory appeal of the Hearing Examiner’s decision, but at the evidentiary hearing Artesian reserved the right to challenge the Hearing Examiner’s decision through exceptions or otherwise.⁴ Staff similarly reserves the right to challenge the Hearing Examiner’s decision through exceptions or otherwise.

An evidentiary hearing was held June 1 and 3, 2016. The parties stipulated to the admission of 128 hearing exhibits.⁵

Pursuant to the Second Agreed Procedural Schedule, post-hearing briefs are due July 25, 2016. In accordance with that schedule, this is Staff’s Post-Hearing Brief to the Hearing Examiner and the Commission.

⁴ Evidentiary Hearing Transcript (“Tr.”) at 23:15-19.

⁵ Tr. at 24-25.

ARGUMENT

I. BURDEN OF PROOF

Notwithstanding Staff's opposition to the Hearing Examiner's determination Order No. 8893 that Artesian has the burden of proof in this proceeding, Artesian has met this burden to prove that the CIAC was properly demanded and calculated of Emblem in accordance with the Commission's decisions, regulations, and policies. Furthermore, Emblem has not presented sufficient evidence that Artesian has failed to meet this burden, and if the burden of proof were placed upon Emblem, as the moving party, as argued by Staff and Artesian, Emblem has failed to meet that burden.

II. THE CIAC WAS PROPERLY DEMANDED BY ARTESIAN.

A. The Commission's regulations require Artesian to impose a CIAC upon Emblem and the other developments in the Christiana Mall area.

Commission regulations define a CIAC, which apply only to Class A Water Utilities, such as Artesian,⁶ as follows:

Contribution In-Aid-of Construction ("CIAC") means cash, services, funds, property or other value received from State, municipal, or other governmental agencies, individuals, contractors, or others for the purpose of constructing or aiding in the construction of utility plant and which represent a permanent infusion of capital from sources other than utility bondholders or stockholders.⁷

Furthermore, Commission regulations require that a "utility *shall* require a CIAC when the request for a Facilities Extension will require the installation of pipe and/or associated utility plant."⁸

Thus, under the Commission's CIAC regulations, a water utility such as Artesian has zero

⁶ 26 Del. Admin. C. § 2001-3.8.9.1.1.

⁷ 26 Del. Admin. C. § 2001-1.3.12; *see also* Hearing Exhibit ("Ex.") 109.

⁸ 26 Del. Admin. C. § 2001-3.8.1 (emphasis added).

discretion regarding whether or not to collect a CIAC. In fact, if Artesian fails to collect a CIAC when circumstances require, Artesian would be in violation of the Commission's regulations and may face monetary penalties or other sanctions.⁹

The CIAC at issue in this proceeding concerns only Category 1B Costs, which are defined as follows:

All off-site Facilities costs that are directly assignable to a specific project from such point 100 feet beyond the boundary of the project and continuing to the utility's existing Main are Category 1B Costs and shall be designated by the utility and funded by the contractor, builder, developer, municipality, homeowner, or other project sponsor, as a CIAC not subject to refund. These costs include such items as Mains, hydrants, treatment plants, wells, pump stations, storage facilities, and shall include any other items that are necessary for the provision of utility water service. Notwithstanding the foregoing, Category 1B Costs shall not include, and the utility shall be entitled to pay for and include in its rate base, any additional Facilities costs elected to be incurred by the utility in connection with the Facilities Extension for company betterment. In determining whether Category 1B Costs are directly assignable to a project, or elected as company betterment, the CIAC shall be calculated based on the cost of installing Mains using a minimum of 8 inch diameter pipe, provided, however, that where Mains of a larger diameter are required by applicable laws, building or fire codes, or engineering standards to provide water service to the project on a stand-alone basis, the CIAC shall be calculated based on the cost of installing Mains using such larger diameter pipe.¹⁰

The Delaware Superior Court has previously upheld the assessment of a CIAC in the context of per-lot fees for residential construction.¹¹ In that decision, the Court upheld the Commission's CIAC regulations and noted:

In the end, the Commission decided that, because they were under-collecting water expansion costs, some utilities were generating rate cases and rate increases too often. After an extensive regulatory process, the Commission basically identified

⁹ See 26 Del. C. §§ 217, 218 (authorizing the Commission to impose monetary penalties for violations of Commission orders and Chapter 26 of the Delaware Code, which governs public utilities); Tr. at 299:3-300:9 (Artesian Witness Spacht testifying that Artesian has no discretion regarding whether or not to impose a CIAC "where clearly growth has caused us to make infrastructure improvements that serve that particular development" and that Artesian would be out of compliance with Commission CIAC regulations if it did not collect a CIAC from Emblem); Tr. at 549:9-550:5 (Staff Witness McDowell testifying that Artesian has no discretion regarding whether or not to collect a CIAC and that Artesian could face monetary penalties).

¹⁰ 26 Del. Admin. C. § 2001-3.8.2.

¹¹ *Reybold Group v. Del. Pub. Serv. Comm'n*, 2007 WL 2199677; see also Ex. 110.

three problems: overuse of advances, rather than contributions; failure to seek reimbursement for direct, off-site costs; and failure to charge indirect costs.

In response to the problems, the Commission decided to limit the use of advances, require that utilities demand contributions for off-site costs, and impose a relatively conservative charge for indirect, expansion costs. The Commission's solution may be imperfect, but it represents a reasoned and workable, administrative approach. Finding a perfect solution, if that were possible, would take far too long and the process would be prohibitively expensive.¹²

Development in the Christiana Mall area necessitated the infrastructure improvements in part for which Emblem was assessed a CIAC by Artesian. Artesian Witness deLorimier offered extensive testimony at the evidentiary hearing regarding why the development in the Christiana Mall area, including Emblem's apartment complex, required the installation of an additional main and a booster station.¹³ Emblem did not offer any credible evidence refuting the necessity of Artesian's infrastructure improvements in this area. In fact, during cross-examination, Emblem Witness Williams acknowledged, regarding Emblem's proposed reliance on the existing 12-inch main serving the area, that he "could not testify whether or not that 12-inch main would have been adequate by itself" "[w]ithout having a new fire flow test."¹⁴

Thus, Artesian has shown that the infrastructure improvements in the Christiana Mall area were necessary to provide adequate service and were caused by new developments, including Emblem's proposed apartment complex. As such, Artesian had no discretion under Commission regulation regarding whether or not to collect a CIAC from Emblem; Artesian was required to do so under Commission regulations. Emblem has not refuted this. In fact, Emblem has acknowledged that it "does not dispute the efficacy of the [CIAC] Regulations, and we are not trying to shirk our responsibility as developers to pay the costs of bringing water to our

¹² *Reybold Group v. Del. Pub. Serv. Comm'n*, 2007 WL 2199677, at *11.

¹³ Tr. at 53:18-61:21.

¹⁴ Tr. at 436:9-17.

development.”¹⁵ Instead, Emblem appears to argue 1) that Artesian failed to provide proper notice of the CIAC; and 2) that the CIAC was improperly calculated. Emblem’s arguments will be addressed further below.

B. Artesian provided notice of the CIAC to Emblem in accordance with Commission regulations, which do not require any notice, and consistent with Artesian’s standard practices.

The Commission’s CIAC regulations, quoted above, do not contain any requirements regarding when or how a utility must provide notice of a CIAC to a utility.¹⁶ Staff Witness McDowell¹⁷ and Artesian Witness Spacht¹⁸ testified that the Commission’s CIAC regulations do not impose any notice requirement upon water utilities regarding when and how a developer is notified of a potential CIAC. Both Witness McDowell¹⁹ and Witness Spacht²⁰ further clarified that the provision in the CIAC regulation that “advances shall apply prospectively”²¹ meant that the newly adopted regulations would not apply retroactively to any water services agreements in place when the new regulations were adopted. The term “prospectively” did not mean and was never understood to mean, as Emblem has attempted to argue, that a water utility was required to provide any advance notice of a CIAC to a developer at any time.²² Artesian, therefore, had no legal obligation to provide Emblem with information regarding the CIAC at any point in time or by any particular method. Emblem has not refuted this. During cross-examination, Emblem

¹⁵ Ex. 111 at 12:15-21.

¹⁶ 26 Del. Admin. C. § 2001-3.8.

¹⁷ Tr. at 548:1-6.

¹⁸ Tr. at 300:12-21.

¹⁹ Tr. at 542:20-545:6.

²⁰ Tr. at 245:8-249:20.

²¹ 26 Del. Admin. C. § 2001-3.8.9.1.2 (“The regulations governing CIAC and Advances shall: ... apply prospectively and therefore shall not affect or apply to circumstances where the water utility has already entered into a water service agreement with the contractor, builder, developer, municipality, homeowner, or other person, regarding the construction of water facilities.”).

²² Tr. at 542:20-545:6.

Witness Kelly could not identify with specificity which Commission CIAC regulation Artesian had violated with respect to providing notice of the CIAC.²³

Artesian Witness Spacht testified that it is Artesian's standard practice to inform developers regarding a CIAC charge when the developer requests service,²⁴ which is precisely what occurred with respect to Emblem.²⁵ When Emblem's agent first requested water service from Artesian on July 21, 2015 via email,²⁶ Artesian responded on July 24, 2015 via email regarding the assessment of the CIAC.²⁷ Artesian provided notice of the CIAC to Emblem consistent with its own internal policies, which are not contrary to Commission regulations or policies.

Other developers in the Christiana Mall area who received the same notice that Emblem did have paid their CIAC without dispute. With respect to the Fashion Center, another development in the Christiana Mall area, Artesian Witness Spacht testified that the Fashion Center had received its New Castle County Water Capacity Certification in 2010, just as Emblem did, and when Artesian later informed the Fashion Center that it would be charged a CIAC of over \$800,000, when the Fashion Center requested service, the Fashion Center paid the CIAC without dispute.²⁸

Emblem mistakenly relies on its erroneous interpretation of a New Castle County Form 40.05.310 for "Water Capacity Certification," which was issued by Artesian to Emblem on February 16, 2010, as binding upon Artesian with respect to the collection of a CIAC. Artesian and Staff witnesses provided extensive testimony regarding the proper interpretation of this form, which is required under the New Castle County Unified Development Code, which has no bearing

²³ Tr. at 378:23-381:12.

²⁴ Tr. at 169:9-171:9; *see, e.g.*, Ex. 33.

²⁵ Tr. at 180:17-181:3; Ex. 46.

²⁶ Ex. 45; Tr. at 302:21-303-12.

²⁷ Ex. 46

²⁸ Tr. at 306:18-307:15.

upon the Commission's jurisdiction, including the collection of CIACs.²⁹ Assuming for the sake of argument that Emblem could rely on the New Castle County Water Capacity Certification in the short term with respect to adequacy of service, it would seem that Emblem's continued reliance – without any subsequent communication with Artesian – on this certification for the intervening 5-year period, where the Christiana Mall area experienced significant change, was imprudent.³⁰ Certainly, Artesian is not required to provide any notice of a CIAC when it provides a New Castle County Water Capacity Certification.³¹ Nor does Artesian have any obligation by law or Commission policy to provide continuing information after the issuance of a New Castle County Water Capacity Certificate.³² If Artesian had such an obligation, it would impose significant costs upon Artesian and its ratepayers, as Witness deLorimier testified.³³ The Commission could, but has not, required this of Artesian and other water utilities when it adopted the CIAC regulations in Regulation Docket 15.

III. THE CIAC WAS PROPERLY CALCULATED BY ARTESIAN.

Artesian presented extensive testimony during the evidentiary hearing regarding how Emblem's CIAC was calculated, including how the directly assignable infrastructure improvements to the Christiana Mall area were allocated among five different development projects, how Emblem was not charged for the booster station but only the 16-inch main, and how no CIACs were assessed for improvements for "company betterment" or overall reliability.³⁴ Staff

²⁹ Tr. at 62-73; Tr. at 548. Staff Witness McDowell also testified that the rationale behind the adoption of the New Castle County Water Capacity Certificate and corresponding regulations was to address drought conditions and sufficient water capacity, not adequacy of service. *See* Tr. at 548:7-549:8.

³⁰ Tr. at 110:2-111:5.

³¹ Tr. at 548:1-6.

³² Tr. at 548:1-6.

³³ Tr. at 74.

³⁴ Tr. at 140:1-160:4; 181:18-190:15.

Witness McDowell also reviewed Artesian's calculation of Emblem's CIAC and found it to be appropriate.³⁵

Emblem presented no credible evidence showing that Artesian's calculation of the CIAC is improper or inaccurate. Emblem attempted to present an alternative calculation of the CIAC,³⁶ but Emblem's alternative calculation relied on infrastructure that would not result in an adequate level of service to the area, including Emblem's development, and would burden Artesian's current ratepayers with the cost of expansion caused by Emblem.³⁷

Furthermore, Emblem Witness Williams suggested during the hearing, in an attempt to portray the CIAC calculated by Artesian as too high, that it would have been "less expensive" for Emblem to tie into Suez Water Delaware, Inc.'s ("Suez") water system.³⁸ However, upon cross-examination, Williams acknowledged that his opinion was based upon "construction cost only"³⁹ and that he had not performed any "engineering cost estimate work,"⁴⁰ performed a fire flow test to ensure that minimum fire flow requirements would be met under the hypothetical alternative, included any estimate of what amount of CIAC Suez would impose, nor included any estimate of the legal and administrative costs to have Artesian abandon its Certificate of Public Convenience and Necessity ("CPCN") and have Suez obtain one, which would be required to provide water service in a particular territory.⁴¹ Staff Witness McDowell⁴² testified as to the legal requirements

³⁵ Tr. at 554:4-555:6; Ex. 74.

³⁶ Ex. 112, at 13:19-14:22 (Emblem Witness Williams's proposed CIAC of \$25,852.50, based on expected usage).

³⁷ Tr. at 278:17-279:5 ("If you were to assess or allocate the cost of that main in the same way that he allocated that cost of the main to all of the other users, the end result would be our current customers footing the bill for the majority of the main and the booster facility..."); Tr. at 555:14-556:24 ("...the current customers would be bearing the majority of the costs of that expansion... plus [Emblem's alternative calculation] did not take into account the need for additional size pipe for fire protection.").

³⁸ Tr. at 415:21-416:15.

³⁹ Tr. at 504:5-9.

⁴⁰ Tr. at 438:5-439:24.

⁴¹ Tr. at 504:5-507:20.

⁴² Tr. at 552:21-553:23.

and costs involved for Artesian to abandon and Suez to obtain a CPCN. Thus, the cost comparison between Suez and Artesian offered by Emblem is misleading at best.

IV. EMBLEM'S OTHER ARGUMENTS ARE UNPERSUASIVE.

A. Emblem had constructive notice of CIACs, and as such, Emblem should have accounted for them in any financing for the development.

Emblem argues that because Artesian did not provide notice of the CIAC when it issued Emblem its New Castle County Water Capacity Certificate in 2010, that Emblem was not able to include such costs in its financing for the project, and for this reason, Artesian's ratepayers should pay the infrastructure costs caused by Emblem's for-profit development. However, as a developer with extensive experience,⁴³ Emblem was aware or should have been aware of the possibility of CIAC costs.⁴⁴ The fact that Emblem did not properly account for or estimate potential CIAC charges in its financing arrangements, made improper assumptions regarding what would comprise adequate water utility infrastructure to its development,⁴⁵ and failed to have any further communication with Artesian regarding a potential CIAC, even after there were obvious changes to the Christiana Mall area and the resulting demand for water,⁴⁶ does not mean that Artesian's ratepayers or other developers should pay these costs and subsidize Emblem's oversight and erroneous assumptions. Furthermore, Emblem Witnesses Kelly⁴⁷ and Williams⁴⁸ both admitted in their testimony during the evidentiary hearing that they were well aware of CIACs, despite

⁴³ Tr. at 316:13-17 (Emblem Witness Kelly has been employed by developer Leon Weiner and Associates for "thirty-six-and-a-half years"); Ex. 112 at 2:1-5 (Emblem Witness Williams has been involved in over 200 development projects.).

⁴⁴ Ex. 111 at 12:21-23 (Emblem has "paid all other necessary charges and hook-up fees required by Artesian to actually provide water service to our development.").

⁴⁵ Ex. 112 at 6:5-23 (assumption by Emblem Witness Williams that existing main would be able to provide adequate service to development without any discussion or confirmation with Artesian).

⁴⁶ Tr. at 356-372; *see also* Ex. 15 at EA000055.

⁴⁷ Tr. at 377:2-378:22.

⁴⁸ Tr. at 498:7-503:6.

representations made earlier in response to Staff's Document Request that they had never had any involvement with a CIAC assessment.⁴⁹ Finally, it is clear that Emblem Witness Williams was aware of a CIAC being collected in another project in the Christiana Mall area when he received a letter from Artesian dated January 17, 2013 for The Market Place at Christiana advising that "this client will be expected to contribute the cost of the water system expansion."⁵⁰

B. Assessment of the CIAC will not result in a double collection by Artesian of these funds.

Emblem argues that collection of the CIAC will result in a double collection by Artesian of these funds through both the CIAC and its rates. Emblem, however, offered no testimony or evidence in support of this assertion. In contrast, Artesian Witness Spacht offered extensive testimony during the evidentiary hearing regarding why there is no possibility of a double collection.⁵¹ Staff Witness McDowell concurred.⁵²

V. A RULING IN EMBLEM'S FAVOR WILL SHIFT THE BURDEN OF DEVELOPERS' COSTS TO RATEPAYERS CONTRARY TO THE PUBLIC POLICY ADOPTED BY THE COMMISSION.

At its core, this dispute is about who pays the \$459,000 required to provide upgrades caused by Emblem's development of an apartment complex in the Christiana Mall area. Either Emblem pays, or someone else does. If someone other than Emblem pays, then Artesian's ratepayers or shareholders⁵³ or the owners of the other area developments, many of whom have already paid their CIACs without dispute, will functionally subsidize Emblem's for-profit development. If

⁴⁹ Ex. 108 ("To the best of its knowledge, neither Emblem Associates, LLC, nor any of its predecessor or affiliated entities, nor any principals of Emblem Associates, LLC, nor any of their predecessor or affiliated entities have ever had any involvement in another development project where Artesian Water Company, Inc. or another public utility sought a CIAC.").

⁵⁰ Ex. 15 at EA000055.

⁵¹ Tr. at 218-230.

⁵² Tr. at 550-552.

⁵³ Tr. at 609:5-12.

anyone other than Emblem pays, the result is manifestly unfair and contrary to public policy as well as the policy established by this Commission in Regulation Docket 15. Regulation Docket 15 resulted in the adoption of the CIAC regulations, the purpose of which, according to Staff Witness McDowell, was to “make sure that in developments being developed here in our State, that the cost causers were paying for those costs and ... not the current ratepayers.”⁵⁴ Artesian’s ratepayers will already have to pay for the legal fees incurred by Artesian in this proceeding; they should not also have to pay Emblem’s CIAC.

Furthermore, the Commission’s decision in the instant case could have a significant deleterious impact upon the ratepayers of Artesian as well as Delaware’s other regulated water utilities if Emblem is excused from paying all or part of the CIAC. Staff Witness McDowell testified that “other builders [and] developers [would] file complaint cases ... and contest our rules,” which would greatly increase the time and money spent on litigation for utilities to collect CIACs.⁵⁵ In addition, if utilities are not able to collect CIACs from developers under the CIAC process established by Regulation Docket 15, then the utilities will likely file more frequent rate cases, which impose a significant cost upon ratepayers for legal and administrative fees, to recover these costs. Reducing the frequency and the costs of rate case was the driving rationale behind Regulation Docket 15 and the CIAC process at issue in this docket. As Staff Witness McDowell testified:

“The CIAC rules were originated because the water utilities were coming in quite often for rate cases. And the Commission wanted to make sure that in developments being developed here in our state, that the cost causers were paying for those costs and did not affect current ratepayers.”⁵⁶

⁵⁴ Tr. at 539:5-17.

⁵⁵ Tr. at 538:13-18.

⁵⁶ Tr. at 539:5-12.

A ruling in Emblem's favor will undermine the public policy rationale behind Regulation Docket 15 to reduce the frequency of rate cases, impose new infrastructure costs upon those causing them, and reduce costs to ratepayers. As such, Emblem's requested relief should be denied.

CONCLUSION

Based on the foregoing, Staff respectfully requests the Hearing Examiner to recommend to the Commission to deny the relief requested by Emblem in its Verified Complaint.

Respectfully Submitted,

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